IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 23.07.2019

Judgment Reserved On: 18.07.2019	Judgment Pronounced On: 23.07.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.764, 855, 856, 973,
974 and 975 to 978 of 2009

T.C.A.No.764 of 2009

Ahill Knit Exports,
No.271/1, Karumarampalayam,
Uthukuli Road,
Tirupur - 641 601. ... Appellant/Appellant in TCA.764/2009

DEE CEE EXPORTS ... Appellant/Appellant in TCA.855/2009 & 856/2009

LIMITEX ... Appellant/Appellant in TCA.973/2009

J.CREATIONS ... Appellant/Appellant in TCA.974/2009 & 975/2009

B.RAJALAKSHMI ... Appellant/Appellant in TCA.976/2009

ROOPA STEAM CALNEDERING WORKS
No.TRA Ginning Factory Compouna ... Appellant/Appellant in TCA.977/2009 & 978/2009

-VS-

The Assistant Commissioner of Income Tax,
Circle I, Tirupur. ... Respondent/Respondent in all TCAs

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Chennai 'A' Bench, dated 31.03.2009 in ITA

No.760/Mds/2008, for the Assessment year 2003-04. (TCA.764/2009) dated 2.2.2009 in ITA No.815/Mds/2008 for the Assessment Year 2000-01(TCA.855/2009) dated 02.02.2009 in ITA No.816/MDS/2008 for the Assessment Year 2003-04 (TCA.856/2009) dated 02.02.2009 in ITA No.814/MDS/2008 for the Assessment Year 2003-04 (TCA.973/2009) dated 02.02.2009 in ITA No.817/MDS/2008 for the Assessment Year 2003-04 (TCA.974/2009) dated 02.02.2009 in ITA No.818/MDS/2008 for the Assessment Year 2004-05 (TCA.975/2009) dated 02.02.2009 in ITA No.775/MDS/2008 for the Assessment Year 2004-05 (TCA.976/2009) dated 18.05.2009 in ITA No.931/MDS/2008 for the Assessment Year 2002-03 (TCA.977/2009) dated 18.05.2009 in ITA No.932/MDS/2008 for the Assessment Year 2003-04 (TCA.978/2009) against the order dated 05.02.2008 made in C.No.320(4)/2007-08/CIT-III CBE on the file of the Commissioner of Income tax - III, Coimbatore- 641 018 and against the order dated 24.03.2006 made in PAN/GIR No. AAAFFA 0909D on the file of the Assistant Commissioner of Income Tax Circle,Tirupur for the Assessment Year 2003-2004 (TCA.764/2009) against the order dated 30.01.2008 made in C.No.320(3)/2007-08/CIT-III/CBEE on the file of the Office of the Commissioner of INcome Tax-III, Coimbatore (TCA 855 & 856/2009 against the order dated 30.01.2008 made in C.No.320/(20)/2007-08/CIT-III/CBE on the file of the Commissioner of Income Tax III, Coimbatore 641 018 and agains the order dated 30/08/2005 made in PAN/GIR No.L.315/AAABFL 07054 on the file of the Assistant Commissioner of Income Tax, Circle - 1, Tirupur for the Assessment Year 2003 - 2004 (TCA.973/2009) against the order dated 22.02.2008 made in C.No.320(11)/2007-08/CIT-III/CBE on the file of the Commissioner of INcome Tax-III, Coimbatore 641 018 against the order dated 30.08.2005 made in PAN/GIR No.AAACFJ 9319 F/J329 on the file of the Assistant Commissioner of Income Tax, Circle I, Tirupur for the Assessment Year 2003-04 (TCA.974 & 075/2009) against the order dated 30.01.2008 made in C.No.320(2)2007-08/CIT-III/CBE on the file of the Commissioner of Income tax -III, Coimbatore and against the order dated 189.08.2006 made in PAN/GIR.No.ACQPR 8240M/R.718 on the file of the Assistant Commissioner of Income Tax, Circle -I, Tirupur for the Assessment Year 2004 -05 (TCA.976/2009) against the order dated 20.02.2008 made in C.No.320(22)/2007-08/CIT-III/CBE and C.No.320(23)/2007-08 C-III/CBE respectively on the file of the Commissioner of Income Tax -III, Coimbatore (TCA 977/2009 and TCA.978/2009).

For Appellant
in all the appeals : Mr.R.Sivaraman

For Respondent
in all the appeals : Mr.T.R.Senthil Kumar
Senior Standing Counsel &
M/s.K.G.Usharani

COMMON JUDGMENT

T.S.SIVAGNANAM, J.

These appeals have been filed by the assessee under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") challenging the orders passed by the Income Tax Appellate Tribunal Chennai 'A' Bench (hereinafter referred to as "the Tribunal") dated 31.03.2009 and the common order dated 02.02.2009.

The appeals were admitted by a common order dated 15.09.2009 on the following Substantial Questions of Law:

1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in upholding the action of the Commissioner of Income Tax u/s. 263 when there are two views possible in completing the assessment?
2. Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in just confirming the order of the Commissioner of Income Tax u/s. 263 without even adverting to the submissions made by the appellant and without rendering any finding to the fact whether duty drawback is entitled to the deduction under 80IB of the Act?
3. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that duty drawback receipt cannot be construed as profits derived from industrial undertaking eligible for deduction u/s.80IB?

With the consent of the learned counsels on either side, T.C.A.No.764 of 2009 is taken as the lead case since the facts are identical and the substantial questions of law framed for consideration are also identical, a decision in T.C.A.No.764 of 2009 would cover the other cases as well though the assessments are for different years and the Tribunal had rendered two separate orders one dated 31.03.2009 impugned in T.C.A.No.764 of 2009 and the other common order dated 02.02.2009 impugned in the other tax case appeals.

2.We have heard Mr.R.Sivaraman, learned Counsel for the appellants/assessees and Mr.T.R.Senthil Kumar, learned Senior Standing Counsel and M/s.K.G.Usharani, learned Junior Standing Counsel for the respondent/revenue.

3.First we take up for consideration Substantial Question of law No.3, as to whether the Tribunal was right in holding that duty drawback receipt cannot be construed as profits derived from an industrial undertaking eligible for deduction under Section 80IB of the Act. This question has been answered against the assessee by the Hon'ble Supreme Court in the case of Liberty India vs. Commissioner of Income Tax [(2009) 183 Taxman 349(SC)]. The issue which fell for consideration before the Hon'ble Supreme Court was whether profit from Duty Entitlement Passbook Scheme (DEPB) and Duty Drawback Scheme could be said to be profit derived from the business of the Industrial Undertaking eligible for deduction under Section 80IB of the Act. The question was answered against the assessee with the following reasons:

> "16.DEPB is an incentive. It is given under Duty Exemption Remission Scheme. Essentially, it is an export incentive. No doubt, the object behind DEPB is to neutralize the incidence of customs duty payment on the import content of export product. This neutralization is provided for by credit to customs duty against export product. Under DEPB, an exporter may apply for credit as percentage of FOB value of exports made in freely convertible currency. Credit is available only against the export product and at rates specified by DGFT for import of raw materials, components etc.. DEPB credit under the Scheme has to be calculated by taking into account the deemed import content of the export product as per basic customs duty and special additional duty payable on such deemed imports. Therefore, in our view, DEPB/Duty Drawback are incentives which flow from the Schemes framed by Central Government or from Section 75 of the Customs Act, 1962, hence, incentives profits are not profits derived from the eligible business under Section 80-IB. They belong to the category of ancillary profits of such Undertakings."

Thus, by applying the decision in the Liberty India's case, the Substantial Question of law No.3 is answered against the assessees.

4.Substantial Question of law Nos.1 and 2 are interconnected and interlaced in the sense that the assessee questions the invocation of the power of the Commissioner of Income Tax (Appeals)(CIT(A)) under Section 263 of the Act on the ground that the assessment orders passed by the Assessng Officer cannot be stated to be erroneous or prejudicial to the interest of revenue. Therefore, Substantial Questions of law Nos.1 and 2 are taken up together for decision.

5.The assessment in the lead case pertain to the assessment year 2003-2004. The assessee is engaged in the business of manufacturing and export of hosiery garments, it filed its return of income on 27.11.2003 admitting a total income of

Rs.43,56,130/-. The assessment was completed under Section 143 (3) of the Act on 24.03.2006 on a total income of Rs.61,44,040/-. In the said order, deduction under Section 80IB of the Act was allowed to the tune of Rs.33,22,896/- being 25% of Rs.1,32,91,583/- which is income under the head "Profits and gains of business of profession". This income of Rs.1,32,91,583/- includes duty drawback receipt of Rs.1,33,44,053/-. The assessment order having been brought to the notice of CIT(A), it was opined that the deduction under Section 80IB of the Act on the duty drawback receipt is not correct and not as per the provisions of the Act and therefore held that the assessment order passed under Section 143(3) of the Act dated 30.08.2005 is erroneous and prejudicial to the interest of revenue warranting remedial action under Section 263 of the Act.

6.Based on such information, the CIT(A) issued notice dated 07.12.2007 proposing withdrawal of deduction under Section 80IB on the duty drawback receipt which was allowed by the Assessing Officer. The assessee was directed to furnish their objections to the proposed action. The objections raised by the assessee were two fold. Firstly on the merits of the matter stating that there is a direct nexus between the business of the industrial undertaking and the receipt of the duty drawback to come to the conclusion that duty drawback is derived from the business of the industrial undertaking. The assessee can no longer putforth such a submission in the light of the law laid down in the light of the decision if the case of Liberty India which has held against the assessee, taking note of which we had decided the substantial question of law No.3 against the assessee. The second objection raised by the assessee was that the issue as to whether the duty drawback should be treated as income eligible for deduction under Section 80IB of the Act or not was the subject matter of several decisions which were in favour of the assessee and therefore when two views were possible, Section 263 of the Act cannot be invoked as the twin conditions contemplated under Section 263 of the Act should be satisfied.

7.The CIT(A) considered the objections, took note of the decisions of this Court in Commissioner of Income Tax vs. Jameel Leathers and Uppers [(2001) 246 ITR 97], Commissioner of Income Tax vs. Viswanathan & Co. [(2003) 26 ITR 737], Commissioner of Income Tax vs. Ritesh Industries Ltd. [(2005) 142 Taxman 551 (Delhi)], Commissioner of Income Tax vs. J.B.Exports Ltd. [(2006) 152 Taxman 189 (Delhi) and held that the issue was settled in favour of the revenue and it cannot be stated that there were two views when the Assessing Officer completed the assessment. It was further held that the twin conditions for invoking Section 263 of the Act, namely, that the assessment order must be erroneous and it must be prejudicial to the interest of the revenue have been satisfied and it does not in any manner violate the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax (Central), Ludhiana vs. Max India Ltd. [(2007) 295 282(SC)]. Accordingly, the CIT(A) directed the Assessing Officer to revise the order of assessment and withdraw the deduction allowed under Section 80IB of the Act on the duty drawback. The assessee filed an appeal before the Tribunal reiterating the grounds raised before the CIT(A) in their objections to the notice issued under Section 263 of the Act. The Tribunal after taking note of the decisions which were relied on by the CIT(A) as well as the decision of this Court in the case of M/s.Sakthi Footwear vs. Assistant Commissioner of Income Tax in TC(A).Nos.1066 and 1067 of 2008 dated 06.08.2008 dismissed the appeal filed by the assessee. this is how the assessee is before us by way of these appeals.

8.In Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax [(2000) 109 Taxman 66 (SC)], the Hon'ble Supreme Court held that the phrase "prejudicial to the interest of the revenue" under Section 263 of the Act has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. It was pointed out that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. By way of illustration, it was pointed out that when the Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of revenue unless the view taken by the Income Tax Officer is unsustainable in law. The decision in the case of Malabar Industries Co. Ltd. was followed in the case of Max India Ltd. Therefore, we are to consider as to whether there were two views possible when the Assessing Officer completed the assessment and granted the benefit of deduction under Section 80IB of the Act. On a reading of the assessment order dated 24.03.2006, it is clear that there is absolutely no discussion by the Assessing Officer with regard to the assessees entitlement for deduction under Section 80IB of the Act on the duty drawback receipt.

9.Mr.T.R.Senthil Kumar, learned Senior Standing Counsel for the respondent/revenue has furnished a tabulated statement mentioning the duty drawback received by all the assessees, from which, we find that in the case of all the assessees the major portion of the deduction claimed under Section 80IB of the Act pertain to the duty drawback received by the respective assessees. In such circumstances, it is incumbent upon the Assessing Officer to discuss the said issue. However, we find the Assessing Officer only had discussed the issue as to whether simultaneous claim of deduction under Sections 80HHC and 80IB of the Act from the gross total income was permissible or not.

Thus, the Assessing Officer failed to take note of this vital issue which ought to have been considered by the Assessing Officer while completing the assessment and granting the relief of deduction under Section 80IB of the Act. Therefore, the order of the Assessing Officer has to be termed as an erroneous order and on account of the unwarranted benefit granted to the assessee, it is definitely prejudicial to the interest of the revenue. Therefore, we would be fully justified in affirming the order passed by the Tribunal.

10.Mr.R.Sivaraman contended that the assessment in the case of the assessee in T.C.A.No.764 of 2009 was completed under Section 143(3) of the Act on 24.03.2006 and on the said date, the decision in Commissioner of Income Tax vs. India Gelatine and Chemicals Ltd. [(2005) 275 ITR 284(Guj.)] was clearly in favour of the assessee as the said decision was rendered by the High Court of Gujarat on 08.04.2004. It is further submitted that apart from the said decision, there were other decisions of the Tribunals which were in favour of the assessee and therefore, when two views were possible, the assessment order cannot be faulted nor can it be stated to be erroneous or prejudicial to the interest of revenue for invoking the power under Section 263 of the Act. It is further submitted that the decision in Jameel Leathers and Uppers was distinguished by the Tribunal in the case of Assistant Commissioner of Income Tax vs. P.S. Apparels [(2006) 101 TTJ (Chennai) 29 on the ground that the decision did not consider the duty drawback receipts but deals with Section 80J and 80H, wherein the wordings are different. It is further submitted that the decision of the Delhi Tribunal in Deputy Commissioner of Income Tax vs. Eltek SGS (P) LTd. [(2006) 10 SOT 178 (Del)] was in favour of the assessee and this decision was subsequently confirmed by the High Court of Delhi in Commissioner of Income Tax vs. Eltek SGS (P) LTd. [(2008) 300 ITR 6 (Del)] and therefore the Assessing Officer was justified in granting the deduction on the duty drawback receipt. It is further submitted that apart from that there were other decisions of the Delhi Tribunal in the case of Metro Tyres, a decision of the Mumbai Tribunal in the case of Anil L.Shah and the decision of the Ahmedabad Special Bench in the case of Nirma Industries. Thus, it is the submission of the learned counsel that the power under Section 263 of the Act could not have been invoked by the CIT(A).

11.As pointed out by us earlier, there is no indication in the assessment order that the Assessing Officer considered the assessee's entitlement for deduction under Section 80IB of the Act on the duty drawback receipts and that he had taken note of the decision in India Gelatin and Chemicals Ltd., P.S. Apparels, Eltek SGS (P) Ltd., Metro Tyres, etc. and granted the benefit. As mentioned earlier, the Assessing Officer had not dealt with this issue while completing the assessment. Therefore, at this juncture, the assessee is precluded from raising a contention that the Assessing Officer adopted one of the two views that were available at the relevant time.

12.Be that as it may, it has to be seen as to whether the CIT(A) was justified in its reasoning while passing an order under Section 263 of the Act and directing the Assessing Officer to withdraw the deduction allowed under Section 80IB of the Act. At the relevant point of time, the decision in Jameel Leathers and Uppers held the field. This decision was clearly against the assessee. It is not the case of the assessee that they distinguished this decision before the Assessing Officer, he had considered the grounds raised by them and then granted the benefit of deduction under Section 80IB of the Act. Therefore, before us the assessee cannot contend that the Assessing Officer took note of the fact that the decision in Jameel Leathers and Uppers was distinguished by the Tribunal in the case of P.S.Apparels. In the absence of any finding to the said effect in the assessment order, we cannot be called upon to infer that the Assessing Officer did so.

13.Apart from the decision in the case of Jameel Leathers and Uppers, there were other decisions of this Court in Commissioner of Income Tax vs. Sterling foods [(1999) 104 Taxman 204 (SC)], Viswanathan & Co., Commissioner of Income Tax vs. Sundaram Clayton Ltd. [(2003) 130 Taxman 64 (Mad.)], the decision of the High Court of Delhi in Ritesh Industries, JB Exports Ltd. which were all against the assessee. As pointed out earlier, the major claim for deduction under Section 80IB was relating to the duty drawback receipts. Therefore, the Assessing Officer having not applied his mind to the said issue, it would be too late for the assessee to now contend that the Assessing Officer had adopted the decisions which were in favour of the assessee at the relevant time. In the case of M/s.Sakthi Footwear, this Court held that the mandate of law in Section 80IB of the Act is that unless the source of the profit is the undertaking, the assessee is not eligible to claim deduction and mere commercial connection between the income and the industrial undertaking would not be sufficient.

14.Thus, for all the above reasons we find that the order passed by the Tribunal is perfectly valid and legal. Accordingly, the Substantial Question of law Nos.1 and 2 are answered against the assessee.

15. In the result, the appeals are dismissed and the Substantial Questions of law are answered against the assessee. No costs.

cse

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Assistant Commissioner of Income Tax,
Circle I, Tirupur.

2.The Income-tax Appellate Tribunal,
"A" Bench, Chennai.

3. The Commissioner of Income Tax - III,
Coimbatore.

+10CCs to Mr.R.Sivaraman Advocate, SR.No.63892/19
+1cc to Mr.T.R.Senthil Kumar, Advocate, SR.No.63627

T.C.A.Nos.764, 855, 856, 973,
974 and 975 to 978 of 2009

Kak(27/09/2019)